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August 22, 1994

Via Messenger

William F. Caton
Acting Secretary,
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: **PP Docket No. 93-253**
Implementation of Section 309(j) of the
Communications Act - Competitive Bidding

Dear Mr. Caton:

Submitted herewith on behalf of the Association of Independent Designated Entities ("AIDE") are an original plus eleven (11) copies of its Petition for Reconsideration of the Fifth Report and Order in the above-captioned matter.

Please direct any questions or comments concerning this submission to my office.

Respectfully submitted,

William J. Franklin
Attorney for the Association of
Independent Designated Entities

Encs.
cc: Assoc. of Independent
Designated Entities

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 309(j) of the Communications Act	)	**PP Docket No. 93-253**
	)	
	)	
Competitive Bidding	)	

To: The Commission

PETITION FOR RECONSIDERATION OF THE ASSOCIATION OF INDEPENDENT DESIGNATED ENTITIES OF THE FIFTH REPORT AND ORDER

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SUMMARY OF ARGUMENT

The Association of Independent Designated Entities ("AIDE") is an unincorporated association of entities likely to qualify as "Designated Entities" for the purposes of Section 309(j).

I

The Commission cannot use the Second Report and Order, adopting generic auction rules, as a shield to prevent reconsideration and appellate review of the Fifth Report and Order, which applied those tentative conclusions to broadband PCS.

II

The Commission has a well-established policy favoring settlements between applicants filing mutually exclusive applications. Congress was well-aware of this policy when it enacted the Omnibus Budget Reconciliation Act of 1993 ("Budget Act"). Amended Section 309(j)(6)(A)-(E) of the Communications Act and the legislative history of the Budget Act clearly show that Congress intended the Commission's settlement policies to apply to auctionable broadband PCS licenses.

Nevertheless, the Commission has adopted broadband PCS auction rules which preclude full settlements between mutually exclusive auctionable applications. The Commission did this without explanation and without any discussion of its existing settlement policies.

III

The Commission designated broadband PCS frequency blocks C and F as "entrepreneurs' blocks," with bidding open to all bidders with attributable, cumulative gross revenues less than

$125 million and total assets less than $500 million. This means that the largest small business could be forced to bid against companies with almost 3 times their gross revenues, if not much larger consortia.

Without doubt, the Commission's statutory authority under Section 309(j) is limited to its giving preferences to the four (4) defined types of Designated Entities. The Commission clearly exceeded that authority when it created a non-statutory preference for sort-of-big-business "entrepreneurs", and made those entrepreneurs eligible to bid against qualified Designated Entities for broadband PCS frequency blocks C and F.

IV

The Commission's financial incentives to Designated Entities (lower up-front payments, installment payments, bidding credits) are only available for broadband PCS frequency blocks C and F, the so-called "entrepreneurs' blocks." This limitation is inconsistent with Sections 309(j)(3)(B) and 309(j)(4)(D), which envision the Commission providing incentives to Designated Entities for all auctionable licenses.

V

The Commission must clarify or amend three aspects of its financial-preference recovery procedures. It should delete the so-called five-year holding and limited transfer period for entrepreneurs' block licenses. It should clarify that only the difference between the level of the bidding credits is recoverable upon the sale of a PCS license subject to bidding credits by a Designated Entity. It should require repayment of bidding

credits or unpaid installments at consummation of the transfer or assignment, not upon approval.

VI

The Commission failed to provide adequate notice of its proposed PCS "filing and processing rules." The Commission provided no information as to the substance of those rules or the regulatory purposes to be achieved thereby.

Virtually no party commented on the filing and processing rules. The Commission adopted some of these rules without explanation, thus violating the Administrative Procedure Act.

The Commission must issue a supplemental Notice of Proposed Rulemaking before adopting broadband PCS filing and processing rules.

Before the
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Washington, D.C. 20554

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To: The Commission

PETITION FOR RECONSIDERATION OF THE ASSOCIATION OF INDEPENDENT DESIGNATED ENTITIES OF THE FIFTH REPORT AND ORDER

The Association of Independent Designated Entities ("AIDE"), by its attorney and pursuant to Section 1.429 of the Commission's Rules, hereby seeks reconsideration of the Commission's Fifth Report and Order in the above-captioned proceeding.[1/] As set forth herein, the Commission failed to adequately protect the interests of small businesses, rural telephone companies, and businesses owned by members of minority groups and women (defined in Paragraph 227 of the Second Report and Order in this proceeding as "Designated Entities").[2/]

[1/] 9 FCC Rcd ____ (FCC 94-178, released July 15, 1994) ("Fifth R&O"). A summary of the Fifth R&O was published in the Federal Register on July 22, 1994. Pursuant to Section 1.4 of the Commission's Rules, this Petition is timely filed.

[2/] See Second Report and Order, 9 FCC Rcd ____ (FCC 94-61, released April 20, 1994) (¶227) ("Second R&O"). Because of the scope of the Fifth R&O, this Petition cannot discuss every issue presented by the Fifth R&O. AIDE's silence on other issues regarding the Fifth R&O should not be taken to indicate any specific position thereon. AIDE specifically reserves its appellate rights with respect to positions taken in its Comments and Reply Comments in this proceeding.

FACTUAL BACKGROUND

In adopting Section 309(j) of the Communications Act, Congress specified that an objective of competitive bidding was to:

> Promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women....[3/]

To implement this goal, Congress required the Commission, in its implementation of competitive bidding regulations, to:

> Ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and for such purposes, consider the use of tax certificates, bidding preferences, and other procedures....[4/]

AIDE is an unincorporated association, with membership limited to persons and entities likely to be classified as "Designated Entities" under Section 309(j) of the Communications Act. AIDE has previously participated in this proceeding, and its qualifications are a matter of public record.[5/] Various AIDE members have extensive legal, technical, financial, and communications backgrounds. Many have owned or managed small businesses, and understand the special needs and problems of small and start-up

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[3/] Section 309(j)(3)(B), partially quoted in Fifth R&O, ¶94.

[4/] Section 309(j)(4)(D), partially quoted in Fifth R&O, ¶93.

[5/] See Declaration of David Meredith Under Penalty of Perjury, Attachment A hereto.

businesses. Accordingly, AIDE has a special expertise to present the position of the Designated Entities to the Commission.

ARGUMENT

I. ALL ISSUES DECIDED IN THE FIFTH REPORT AND ORDER ARE SUBJECT TO RECONSIDERATION AND APPELLATE REVIEW AT THIS TIME.

As a preliminary matter, the Commission cannot use the Second R&O adopting generic auction rules, as a shield to prevent reconsideration and appellate review of the Fifth R&O, which applied those tentative conclusions to broadband PCS. For example, in the Second R&O the Commission wrote:

> The five sections of this Report and Order summarized above establish general rules and regulations for competitive bidding that will apply to a variety of spectrum-based services licensed by the Commission. In the future, specific rules within the scope of these general rules will be adopted in a Report and Order for each service subject to competitive bidding.[6/]

Thus, in the case of auction methodology for each service, the Commission wrote:

> We intend to tailor the auction design to fit the characteristics of the licenses to be awarded. Given the diverse characteristics of the various services that may be subject to auctions, simultaneous multiple round auctions may not be appropriate for all licenses. * * *
>
> In future Reports and Orders where we establish service-specific auction rules we will indicate a preferred auction design method for each particular service and specify any alternative design methods that we may test in auctioning licenses within that particular service.[7/]

[6/] Second R&O, supra, ¶10.

[7/] Second R&O, supra, ¶¶112, 115. In the Second R&O, the Commission reserved a similar flexibility with respect minimum bids (id., ¶126), stopping rules (id., ¶132), activity rules (id., ¶144), upfront payments (id., ¶¶171-72 & n.132, 178, 180), license eligibility for installment payments (id., ¶237), eligi- (continued...)

Thus, the Second R&O did not resolve auction issues so much as specify a framework in which subsequent decisions, including the Fifth R&O, would resolve them. Further, even where the Second R&O resolved issues generically, the application of those policies to broadband PCS (in the context of broadband PCS-specific rules adopted in the Fifth R&O) can require reconsideration of all related issues in the Fifth R&O.

Under these circumstances, the Administrative Procedure Act requires that AIDE -- and others seeking reconsideration of the Fifth R&O -- not be precluded as to any issue resolved therein (even if resolved by reference to the Second R&O) by their decision not to seek reconsideration of the generic auction rules.

In fact, AIDE did file a Petition for Reconsideration of the Second R&O on June 3, 1994 (the "Second R&O Petition"). AIDE hereby incorporates that Petition by reference to the extent that certain of the issues raised generically in the Second R&O Petition now may be applied specifically to the Fifth R&O:

[1/](...continued)
bility for bidding credits (id., ¶242), spectrum set-asides (id., ¶247), the definition of "small business" (id., ¶271), and other fundamental auction-design decisions.

Issue Raised in the Second R&O Petition	Relevant Sections of Fifth R&O
Should the Commission impose bidding activity rules on Designated Entities? Argument III, pages 12-13.	Part IV.C.5, ¶¶51-57
Should the Commission collect the 3% default penalty when a windfall will result? Argument III, pages 14-15.	Part V.C.2, ¶76
Can the Commission lawfully recapture "unjust enrichments" resulting from bidding credits when no "enrichment" occurs? Argument IV, pages 16-18.	Part VII.E, ¶134; Part VII.F, ¶141

Resolution of these arguments in the context of the Fifth R&O will serve the public interest.

II. THE COMMISSION'S ADOPTION OF AUCTION RULES WHICH APPARENTLY PROHIBIT FULL SETTLEMENTS BETWEEN MUTUALLY EXCLUSIVE, AUCTIONABLE BROADBAND PCS APPLICATIONS VIOLATES SECTION 309(j) OF THE COMMUNICATIONS ACT.

The Commission has a well-established policy favoring settlements between applicants filing mutually exclusive applications. Any attempt to hinder that policy or to prevent full settlements between mutually exclusive applicants for auctionable licenses violates specific provisions of Section 309(j).

A. Both The Communications Act and The Commission Have A Well-Established Policy Favoring Full Settlements of Mutually Exclusive Applications.

The Communications Act explicitly recognizes the Commission's settlement policy. Sections 311(c) and (d) permit the Commission to approve settlements between mutually exclusive broadcast applicants whenever it can find that the settlement

serves the public interest and that no party to the agreement filed its application for the purposes of settlement. The Commission has found that Section 311(c) indicates a Congressional determination that:

> [S]ettlement agreements "generally serve the public interest because they often avoid lengthy hearing appeals, thus expediting the start of the new broadcast service...."[8/]

Although this policy developed in a broadcast context, the Commission has applied it to services having auctionable licenses as well.

Thus, in amending Part 22 of the Commission's Rules to permit settlements between common-carrier land-mobile applicants, the Commission reasoned:

> Congress recently amended Sections 311(c) and (d) of the Communications Act, liberalizing previous [settlement] standards....
>
> Section 311 of the Act does not explicitly apply to the Public Mobile Services. * * * We believe that the regulatory concerns embodied in our old [settlement] rule are no longer relevant in the public mobile services. * * * In light of the policy embodied in the Congressional amendments to the Communications Act, ... we believe it is in the public interest to eliminate the prior approval requirement and adopt the [settlement] rule as proposed.[9/]

[8/] Broadcast Settlement Agreements, 6 FCC Rcd 85 (1990) (¶2), modified, 6 FCC Rcd 2901 (1991), quoting H.R. Rep. No. 765, 97th Cong. 2nd Sess. 50 (1982) (Conference Report). Although this proceeding limited settlement payments to challengers, it also reasoned that this policy "should not be applied in such a manner to preclude or unduly hinder legitimate merger transactions involving competing applicants." The Commission has also found that "settlements ... can be an efficient way to resolve comparative licensing proceedings...." Broadcast Renewals, 4 FCC Rcd 4780 (1989) (¶32).

[9/] Revision of Part 22, 95 FCC 2d 769 (1983) (¶¶88-89).

The Commission's Part 22 settlement rule, now codified in Section 22.29 of the Rules, tracks the requirements of Section 311(c) and (d) and permits settlements between mutually exclusive applicants without prior Commission approval.

In the cellular context, the Commission's settlement policy developed with the Commission's acceptance of full-market wireline settlements in the Chicago and Los Angeles MSAs in 1983.[10/] At that time, Commissioner Fogarty best articulated the Commission's settlement policies:

> [T]his Commission has now twice determined that settlements by mutually exclusive cellular radio applicants are in the public interest, convenience and necessity and will be approved by the FCC.... We have been faithful to this paramount regulatory responsibility in encouraging cellular applicant settlements, and this particular settlement agreement -- and those settlements which I hope will follow on both the wireline and nonwireline sides of the split-frequency cellular allocation -- enjoy the full measure of the Commission's approval.[11/]

In applying the lottery process to cellular applications, the Commission explicitly retained its policy favoring full-market settlements.[12/]

[10/] Advanced Mobile Phone Service, Inc., 91 FCC 2d 512 (1983) (Chicago); Advanced Mobile Phone Service, Inc., 93 FCC 2d 683 (1983) (Los Angeles).

[11/] Los Angeles, supra (Fogarty, Separate Statement).

[12/] Cellular Lottery Rule Making, 101 FCC 2d 577, 582 (1984), modified, 59 RR 2d 407 (1985), aff'd in relevant part, Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551 (D.C.Cir. 1987). Accord, Fresno Cellular Telephone Company, 1985 LEXIS 2427, *12 ("Our policy of encouraging settlements has enabled us to expedite the processing of cellular applications and thus to bring cellular service to the public with a minimum of delay."), aff'd, Maxcell Telecom Plus, supra; Telocator Network of America, 58 RR 2d 1443 (1985) (tax certificates issued to further the

(continued...)

Although mutual exclusivity (and the need for settlements) traditionally has been rare in the private radio services, Section 90.621(b)(5) of the Rules permits 800 MHz SMR applicants to file short-spaced applications within the consent of co-channel applicants. In adopting this rule, the Commission reasoned:

> [Adopting this rule] will further the public interest in several significant respects. First, codification of our consensual short-spacing procedures will make arrangements of this type more accessible to applicants, which in turn will encourage more efficient use of the radio spectrum and enhance competition....[13/]

The Commission consistently has followed a similar policy permitting, if not encouraging, settlements with respect to other radio services as well.[14/]

Thus, at the time Congress was considering the amendments to the Communications Act which were ultimately adopted as part of the Omnibus Budget Reconciliation Act of 1993 ("Budget Act"), the Commission had a well-established settlement policy.

[12/](...continued)
Commission's policy favoring full-market settlements); First Report and Order and Memorandum Opinion and Order On Reconsideration, 6 FCC Rcd 6185, 6221 (1991), reconsidered in part, 7 FCC Rcd 7183 (1992) (cellular unserved areas).

[13/] SMR Short-Spacing, 6 FCC Rcd 4929 (1991) (¶3).

[14/] See, e.g., Section 21.29 (settlements permitted in the Digital Electronic Message Service, Point-to-Point Microwave Service, and Local Television Transmission Service); Section 94.63(d)(4) (settlements permitted in 928-930 MHz Multiple Address Service).

B. In Adopting The Auction Provisions of Section 309(j), Congress Required The Commission to Apply Its Existing Settlement Policies to Auctionable Applications.

Congress explicitly affirmed the Commission's settlement policy. Specifically, amended Section 309(j)(6) of the Communications Act contains the following "Rules of Construction":

> (6) Rules of Construction.- Nothing in this subsection [309(j)], or in the use of competitive bidding, shall-
>
> > (A) Alter spectrum allocation criteria and procedures established by the other provisions of this Act;
> >
> > * * *
> >
> > (E) Be construed to relieve the Commission of the obligation in the public interest to continue to use ... negotiation ... and other means in order to avoid mutual exclusivity in application and licensing proceedings....

The Conference Report accompanying the Budget Act explained that Section 309(j)(6):

> [S]tipulates that nothing in the use of competitive bidding for the award of licenses shall limit or otherwise affect the requirements of the Communications Act that limit the rights of licensees, or require the Commission to adhere to other requirements.[15/]

These two provisions in Section 309(j)(6) clearly indicate that Congress intended the Commission to carry forward its existing settlement policies.[16/] The mandated "use [of] negotiation ...

[15/] Conference Report to the Budget Act, H.R. Rep. 103-213, 103rd Cong. 1st Sess, 103 Cong. Rec. H5792, H5915 (August 4, 1993) (provision of House bill adopted in final Budget Act) ("Conference Report").

[16/] Section 309(j)(1) states that, "If mutually exclusive applications are accepted for filing ..., then the Commission shall have the authority ... to grant such license ... through the use of system of competitive bidding that meets the requirements of this subsection." (Emphasis added.) Tellingly, Section (continued...)

and other means in order to avoid mutual exclusivity in application and licensing proceedings" can only mean that settlements (which are the product of negotiation and which avoid mutual exclusivity) are to be permitted under competitive bidding.

C. The Commission Erred In Adopting Broadband PCS Auction Rules Which Preclude Full-Market Settlements.

The Commission's broadband PCS auction rules are contrary to those statutory requirements. Specifically, the Commission proposes that, once a short-form auction application is filed, auction applicants "will not be permitted to make any major modifications to their applications, including ownership changes or changes in the identification of parties to bidding consortia."[17/] Similarly, the Commission states that:

> [F]rom the time the short-form applications are filed and prior to the time that the winning bidder has made its required down payment, all bidders are prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies with other bidders, unless such bidders are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short form application.[18/]

[16/](...continued)
309(j)(1) does not require that the Commission must use competitive bidding, but only that it has the authority to do so in appropriate cases. That language, together with the incorporation of Sections 309(j)(6)(A)&(E) and 309(j)(7)(B) ("the requirements of this subsection") clearly indicates the legislative intent to make mutually exclusivity only a prerequisite to holding an auction, and not the triggering event for a mandatory auction against the wishes of settling applicants.

[17/] Fifth R&O, ¶43.

[18/] Fifth R&O, ¶91 (emphasis added). See also Second R&O, supra, ¶225.

In other words, the Commission proposes that, once the short-form (pre-bid) applications are filed, the parties will be prohibited from entering into joint ventures or other agreements concerning their bid. However, until the short-form applications are filed, the parties cannot enter into settlement agreements. The listing of short-form applicants tells the parties with whom they must settle, i.e., it lists all the applicants for a specific license.[19/]

Thus, the Fifth R&O appears to have prohibited settlements between applicants for broadband PCS licenses in a market by preventing the formation of post-filing joint ventures or similar arrangements between all the mutually exclusive applicants.[20/] Tellingly, the Commission never explained the regulatory or statutory purposes which its prohibition was intended to satisfy. As a matter of law, the Commission cannot be concerned that full settlements constitute "collusion" between auction bidders; Section 309(j)(6)(A) & (E) of the Communications Act evidence a Congressional requirement that settlements serve the public interest.

Tellingly, the Commission's only mention of the word "settlement" in the Fifth R&O appears in Section 24.829(b) of its

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[19/] See Fifth R&O, ¶62.

[20/] Paragraphs 30 and 31 of the Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 9 FCC Rcd ____ (FCC 94-219, released August 17, 1994) (PP Dkt. No. 93-253, GEN Dkt. No. 90-314, ET Dkt. No. 92-100), states that the Commission explicitly intended to prohibit settlements in the narrowband PCS. It is reasonable to assume that the Commission intended the same result here.

newly adopted rules, which adopts the following policy for broadband PCS applications:

> Policy: Parties to contested proceedings are encouraged to settle their disputes among themselves. Parties which, under a settlement agreement, apply to the Commission for ownership changes or for the amendment or dismissal of either pleadings or applications, shall at the time of filing notify the Commission that such filing is the result of an agreement or understanding.[21/]

Section 24.829, however, is subject to Section 1.2105 of the Rules, which was adopted by the Second R&O.[22/] Thus, having adopted its "policy" favoring settlements, the Commission made the policy subject to a rule which could well be read as prohibiting settlement discussions.

The Commission's prohibition against settlements is inconsistent with Section 309(j). Although unexplained, it appears to be motivated by revenue maximization, which is prohibited by Sections 309(j)(7)(A) & (B) of the Communications Act:

> (7) Consideration of revenues in public interest determinations.-
>
> > (A) Consideration prohibited.-In making a decision pursuant to Section 303(c) to assign a band of frequencies to a use for which licenses or permits will be issued pursuant to this subsection, and in prescribing regulations pursuant to paragraph (4)(C) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity on the expectation of federal revenues from the use of a system of competitive bidding under this subsection.

[21/] Section 24.829(b) (emphasis added).

[22/] Section 1.2105(c) prohibits potential bidders for an auction from discussing "the substance of their bids or bidding strategies" with other bidders (not disclosed as part of a bidding consortium) after filing the short-form application.

> (B) Consideration limited.-In prescribing regulations pursuant to paragraph (4)(A) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity solely or predominantly on the expectation of federal revenues from the use of a system of competitive bidding under this subsection.

(Emphasis added.) The prohibition against settlements also cannot be reconciled with Section 309(j)(6), as quoted above. Further, it represents poor public policy, in that potential licensees would be arbitrarily precluded from structuring rational and competitive business arrangements between themselves once the pre-bid documents had been filed.

Accordingly, upon reconsideration, the Commission must clarify its broadband PCS auction rules to specify that full settlements are permissible between mutually exclusive applications for auctionable licenses.

III. THE COMMISSION EXCEEDED ITS AUTHORITY UNDER SECTION 309(j) IN GRANTING FINANCIAL INCENTIVES AND FREQUENCY SET-ASIDES TO NON-DESIGNATED ENTITIES.

Section VII.A of the Fifth R&O takes almost 9 pages of printed text, 20 numbered paragraphs, and 25 footnotes to explain why designated entities need special financial incentives and frequency set-asides for broadband PCS. Specifically, the Commission found a Congressional intent "that designated entities have the opportunity to participate in the provision of PCS" (¶96), that small businesses have difficulties in accessing capital (¶97), that "funding problems are even more severe for minority and women-owned businesses" (¶98), that the Commission must take affirmative steps "to counteract these barriers to

entry" (¶103), and that "Congress directed the Commission to remedy this serious imbalance in the participation by certain groups, especially minorities and women" (¶110).

Having found a general statutory policy favoring Designated Entities, the Commission then eviscerated that policy by throwing the Designated Entities in with some substantially larger, non-Designated Entities. By way of analogy to the games of ancient Rome, it is as if the Romans decided to feed the Christians only to smaller lions. However benevolent this policy might be in some abstract sense, the Christians will still likely be some lion's lunch.

Specifically, the Commission designated broadband PCS frequency blocks C and F as "entrepreneurs' blocks," with bidding open to all bidders with attributable, cumulative gross revenues less than $125 million and total assets less than $500 million.[23/] At the same time, the Commission redefined "small business" to include any company with attributable, cumulative gross revenues less than $40 million.[24/] The Commission also permitted outside investors to provide as much as 75% of the passive equity of an "entrepreneur" or "small business without

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[23/] Fifth R&O, ¶¶113, 156. The net worth of each attributable investor in an "entrepreneur" must be less than $100 million. Id.

[24/] Fifth R&O, ¶¶113, 175. The net worth of each attributable investor in an "entrepreneur" must be less than $40 million. Id.

the assets or gross revenue of the investor being counted as part of the applicant[25/]

Thus, the largest small business could be forced to bid against companies with almost 3 times their gross revenues. Indeed, because the Commission provided further that consortia of small businesses remain qualified as "entrepreneurs" without regard to their aggregate size,[26/] independent small businesses could be forced to bid against arbitrarily large consortia.[27/]

Without doubt, the Commission's statutory authority under Section 309(j) is limited to its giving preferences to the four (4) defined types of Designated Entities.[28/] The Commission clearly exceeded that authority when it created a non-statutory preference for sort-of-big-business "entrepreneurs", and made those entrepreneurs eligible to bid against qualified Designated Entities for broadband PCS frequency blocks C and F.

[25/] Fifth R&O, ¶¶115-116, 158-163. This limitation is either too much or too little. AIDE suggests that the Commission eliminate this exception to the various size tests. With the exemption, the Commission is not rewarding size (as Congress intended), but deal-making and company-structuring ability. Conversely, if the exemption is retained, the Commission should permit the non-attributable investor to contribute all of the passive equity, which by definition cannot transfer control of the applicant.

[26/] Fifth R&O, ¶¶138 n.116, 158.

[27/] The Commission has concluded that larger companies with established revenue streams are likely to prevail over smaller, new companies in any PCS auction. See Fifth R&O, ¶136.

[28/] See Sections 309(j)(3)(B) and 309(j)(4)(D) of the Communications Act; Conference Report, H5914.

IV. THE COMMISSION CANNOT LIMIT ITS USE OF FINANCIAL INCENTIVES BY DESIGNATED ENTITIES ONLY TO BROADBAND PCS FREQUENCY BLOCKS C AND F.

Throughout the Fifth R&O's discussion of the financial incentives available to Designated Entities (¶¶93-217), one clear theme emerges: The Commission's financial incentives to Designated Entities (lower up-front payments, installment payments, bidding credits) are only available for broadband PCS frequency blocks C and F, the so-called "entrepreneurs' blocks."[29/]

The Commission explained that this limitation is based on its belief that "the extremely capital intensive nature of broadband PCS" would prevent Designated Entities from winning any PCS license in non-insulated frequency blocks, with or without bidding credits or other financial preferences.[30/] However, that reasoning begs in the question, in that the Commission's limitation could well prevent Designated Entities from prevailing in smaller markets in the non-insulated frequency blocks.[31/]

Further, the Commission's limitation on financial incentives is inconsistent with the statutory intent of Section 309(j)'s

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[29/] Tax certificates are available to assist only minority- and women-owned businesses in other PCS frequency blocks. Fifth R&O, ¶143.

[30/] Fifth R&O, ¶131.

[31/] For example, why shouldn't a Designated Entity be permitted to use financial preferences to acquire the 30 MHz MTA license for the Pacific territories, the D- or E-block licenses in smaller BTAs, or even in bigger markets in which the Designated Entity has an advanced business plan and appropriate debt financing?

preferences for Designated Entities.[32/] Accordingly, the Commission must make its financial incentives available to Designated Entities for every auctionable broadband PCS license.

V. THE COMMISSION MUST CLARIFY OR AMEND THREE ASPECTS OF ITS FINANCIAL-PREFERENCE RECOVERY PROCEDURES.

The Commission must clarify or amend three aspects of its financial-preference recovery procedures.

First, paragraphs 128 and 129 of the Fifth R&O create a three-year period in which licensees in the entrepreneurs' blocks cannot transfer or assign their licenses, and an additional two-year period in which they can only do so to other entrepreneurs. The Commission adopted this prohibition to prevent unjust enrichment by the licensee and undermine the Congressional intent of giving Designated Entities the ability to provide spectrum-based services.

This limitation should be stricken. The Commission's unjust enrichment provisions (recovery of bidding credits and installment payments) eliminates one basis for this limitation. The other stated basis has no justification; once a Designated Entity receives a spectrum-based license, it has received a fair opportunity to provide spectrum-based service. The Congressional intent has been fully satisfied.

This limitation only penalizes the Designated Entities by preventing them from selling their licenses if their business

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[32/] See Section 309(j)(3)(B) and 309(j)(4)(D) of the Communications Act. AIDE's Second R&O Petition (Argument II, pages 8-12) presents additional argument on this point, and is incorporated herein by reference.

plans do not work out, and they find themselves losing money. It would be a cruel perversion of the Congressional intent to deny the Designated Entities the classic escape for a money-losing business, i.e., selling the business before it reaches bankruptcy.

Second, paragraph 117 of the Fifth R&O states that the entire bidding credit is recoverable if a Designated Entity transfers or assigns its license to a company who qualified for a lesser bidding credit or for no credit at all. In contrast, paragraph 134 states that only the difference between the level of the bidding credits is recoverable, a far more rational and equitable provision. The Commission should clarify that the latter interpretation controls.

Third, in paragraphs 117, 134, and 141, the Fifth R&O states that the unpaid balance of any installment license bid and any excess bidding credits must be paid "before the sale is approved" when a Designated Entity qualifying for an installment payments or bidding credits transfers or assigns its license to a non-qualified entity. As written, this provision will work a hardship.

As the Commission well knows, many approved CMRS transfers or assignments are not consummated. However, under this proposal, the Designated Entity is required to repay the financial incentive before the transfer or assignment application is granted, even if the deal then falls apart. The Commission will achieve the same financial result if the repayment is due at consummation of the transfer or assignment, not upon approval.

VI. THE COMMISSION ADOPTED BROADBAND PCS APPLICATION-PROCESSING RULES WITHOUT ADEQUATE NOTICE OR EXPLANATION, BOTH OF WHICH ARE LEGALLY REQUIRED FOR A RULEMAKING PROCEEDING.

Although this rulemaking is limited to implementation of the competitive bidding requirements of Section 309(j) of the Communications Act[33/] (NPRM, ¶¶1-10), in a brief reference the Commission proposed substantive PCS application-processing rules:

> In order to avoid needless duplication, we propose that the following general filing and processing rules apply to all PCS: Sections 22.3-22.45 and 22.917(f), and 22.918-22.945, 47 C.F.R. §§ 22.3-22.45, 22.917(f), and 22.918-22.945. For those PCS applicants who file on Form 574, we believe that Sections 90.113-90.159 of our rules, 47 C.F.R. §§ 90.113-159, could be used to process those applications with appropriate modifications.[34/]

This rulemaking topic is improper, being not within the scope of the NPRM.

Accordingly, AIDE's Comments (at 16-18) argued that this proposal is legally insufficient to constitute a valid notice of proposed rules.[35/] Indeed, the cited Part 22 and Part 90 Rules have no immediate applicability to PCS service, being limited to

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[33/] Notice of Proposed Rulemaking, 8 FCC Rcd 7635, 7635-36 (1993) ("NPRM").

[34/] NPRM, supra, 8 FCC Rcd at 7656 (¶128).

[35/] Section 1.413(c) of the Commission's Rules requires that every Notice of Proposed Rule Making include "Either the terms or substance of the proposed rule or a description of the subjects and issues involved." The NPRM's PCS "proposal," such as it is, is insufficient under this standard.

Clearly, the NPRM does not state "the terms ... of the proposed rule or a description of the subjects and issues involved." The NPRM contains no proposed rules and no description of the "subjects and issues." Similarly, the NPRM does not provide sufficient notice of the "substance" of the proposed PCS rules. The "appropriate modifications" which the Commission recognized are necessary are not specified.